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In The

Supreme Court of the United States

October Term, 1995

STATE OF CALIFORNIA, DIVISION OF LABOR STANDARDS ENFORCEMENT, DIVISION OF APPRENTICESHIP STANDARDS, DEPARTMENT OF INDUSTRIAL RELATIONS; COUNTY OF SONOMA,

Petitioners,

v.

DILLINGHAM CONSTRUCTION, N.A., INC.; MANUEL J. ARCEO DBA SOUND SYSTEMS MEDIA,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the Employee Retirement Income Security Act of 1974 (ERISA) preempt a State's ability to enforce its prevailing wage laws, contrary to the terms of an apprenticeship training program which constitutes an employee welfare benefit plan within the meaning of ERISA?

AFFILIATED COMPANIES

Respondent Dillingham Construction, N.A., Inc. is a privately held corporation. Its parent companies are Dillingham Construction Corporation and Dillingham Construction Holdings, Inc. A related subsidiary corporation is Dillingham Construction Canada, Ltd.

Respondent Manuel J. Arceo dba Sound Systems Media is a sole proprietorship, not a corporation.

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STATEMENT OF THE CASE

When Sound Systems Media ("Sound Systems") began work on the Sonoma County Main Adult Detention Facility in early 1988, it was signatory to a collective bargaining agreement with International Brotherhood of Electrical Workers Local 202. That collective bargaining agreement contained a separate wage scale for apprentice electronic technicians and required Sound Systems to make contributions to an ERISA apprenticeship program, the Northern California Sound and Communications Joint Apprenticeship and Training Committee. That apprenticeship program was approved by the California Apprenticeship Council. Petitioners' Appendix 26 (hereinafter "Pet. App.").

Shortly after Sound Systems began work on the project, Local 202 disclaimed interest in representing the electronics technician employees of Sound Systems. In response to this unexpected development, Sound Systems was forced to seek out another collective bargaining partner. Pet. App. 26.

In June 1988, one month after the disclaimer of interest by Local 202, Sound Systems signed a new collective bargaining agreement with the National Electronic Systems Technicians Union ("NESTU"). The NESTU collective bargaining agreement also contained an apprentice wage scale, and it created a new apprenticeship program, the Electronic and Communications Systems Joint Apprenticeship and Training Committee ("E&C JATC"). During the period of time that Sound Systems performed the bulk of its work on the project, the new E&C JATC

was in existence, but it had not yet been approved by the California Apprenticeship Council. Pet. App. 26-27.

The new E&C JATC applied to the California Apprenticeship Council for approval in August 1989, and it was approved in October 1990. However, the approval was not retroactive. Pet. App. 27.

In reliance on its collective bargaining agreement with NESTU, Sound Systems employed several apprentices on the project and paid them wages and benefits in accordance with the collective bargaining agreement. Even though Sound Systems previously participated in the Northern California Sound and Communications Joint Apprenticeship and Training Committee and the new E&C JATC was eventually approved, the State has taken the position that Sound Systems violated California's prevailing wage laws by not paying journey-level wage rates to all employees working on the project. Pet. App. 27.

On appeal to the Ninth Circuit, after the district court dismissed their complaint for declaratory relief, Respondents argued that (1) the State's enforcement of its prevailing wage laws was contrary to the terms of a collective bargaining agreement and therefore preempted by the National Labor Relations Act (NLRA), 29 U.S.C. § 151, *et seq.* (*see Bechtel Construction, Inc. v. United Brotherhood of Carpenters*, 812 F.2d 1220 (9th Cir. 1987)); (2) the State's interference with the collective bargaining process entitled Respondents to recover damages and attorneys' fees pursuant to 42 U.S.C. §§ 1983 and 1988 (*see Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608 (1986)); and (3) the State's enforcement of its prevailing

wage laws was preempted by ERISA, 29 U.S.C. § 1001, *et seq.*

The Ninth Circuit did not reach the NLRA preemption issue or the claim for damages brought pursuant to 42 U.S.C. § 1983, ruling instead that the State's enforcement of its prevailing wage law against Sound Systems was preempted by ERISA. Pet. App. 22.[1] In resolving the ERISA preemption issue, the Ninth Circuit's ruling was a narrow one. The Court did not strike down California's entire prevailing wage law; instead, it merely ruled that the challenged application of the prevailing wage statute was preempted, leaving California free to apply its prevailing wage law to any situations where ERISA does not override state law.

REASONS FOR DENYING THE WRIT

I. There Is No Direct Conflict Between The Circuits Warranting Supreme Court Review.

Respondents concede that the Ninth Circuit and the Eighth Circuit interpret the Fitzgerald Act differently for purposes of applying ERISA's savings clause. The Ninth Circuit views the Fitzgerald Act (29 U.S.C. § 50) as a statement of principles and a directive to the Secretary of

[1] It is unfortunate that the Ninth Circuit did not base its decision on grounds of NLRA preemption. Such a ruling would have been a straightforward application of the Ninth Circuit's earlier decision in *Bechtel Construction, Inc. v. United Brotherhood of Carpenters*, 812 F.2d 1220 (9th Cir. 1987) and would have attracted very little attention or controversy.

Labor to cooperate with State agencies in promoting apprenticeship; however, the Act does not authorize the States to enforce federal law. Pet. App. 17-18. *See also Hydrostorage, Inc. v. Northern California Boilermakers Local Joint Apprenticeship Committee*, 891 F.2d 719, 731 (9th Cir. 1989), *cert. denied*, 498 U.S. 822 (1990). The Tenth Circuit Court of Appeals shares this view of the Fitzgerald Act. *National Elevator Industry, Inc. v. Calhoon*, 957 F.2d 1555, 1562 (10th Cir. 1992), *cert. denied*, 113 S. Ct. 406 (1992) (the Fitzgerald Act "merely seeks to facilitate development of apprenticeship programs – it does not mandate apprenticeship programs or seek to discourage other training programs"). In contrast, the Eighth Circuit interprets the Fitzgerald Act as giving State agencies the authority to apply federal apprentice standards for federal purposes. *Minnesota Chapter ABC v. Minnesota*, 47 F.3d 975, 980 (8th Cir. 1995).

One possible reason the Ninth and Eighth Circuits have expressed different views regarding the Fitzgerald Act is that they were addressing different issues and were attempting to answer very different questions. In *Minnesota Chapter ABC*, the Eighth Circuit was confronted by a wholesale attack on the State's entire prevailing wage statute, whereas the Ninth Circuit below faced a narrow attack on the application of a state prevailing wage law to a specific situation.

The plaintiffs in *Minnesota Chapter ABC* argued that the Minnesota Prevailing Wage Law was preempted in its entirety because the statute defined the prevailing wage to include contributions for "health and welfare benefits, vacation benefits, pension benefits, and any other economic benefit" paid to the relevant group of employees.

Minn. Stat. § 177.42, subd. 3. That issue – whether a state prevailing wage statute is preempted because of the way that the prevailing wage is calculated – has come before several Courts of Appeals with different results. *See Minnesota Chapter ABC v. Minnesota*, 47 F.3d at 978-980 (no preemption); *Keystone Chapter ABC v. Foley*, 37 F.3d 945 (3rd Cir. 1994), *cert. denied*, 115 S. Ct. 1393 (1995) (same); *General Electric Co. v. New York State Department of Labor*, 891 F.2d 25 (2d Cir. 1989) (that portion of the New York prevailing wage statute dealing with "supplements" held preempted).

Along the same lines, the plaintiffs in *Minnesota Chapter ABC* argued that the apprentice portion of Minnesota's Prevailing Wage Law was preempted because it contains an exemption for apprentices who are "employed and registered in a *bona fide* apprenticeship program registered with the U.S. Department of Labor or with a state apprenticeship agency." Minn. R. 5200.1070, subp. 2. If the Eighth Circuit had agreed with the plaintiffs, the entire exemption for apprentices would have been eliminated, and no employer would have been permitted to pay lower wages and benefits to apprentices in training.

This case, in contrast, does not involve an attempt to judicially repeal an entire state prevailing wage law. The Ninth Circuit merely held that California could not apply its prevailing wage law to the apprentices employed by Sound Systems. Pet. App. 17-18. In this respect, there is no direct conflict between the decisions of the Eighth and Ninth Circuits because the issues addressed are substantially different in scope.

There is another unexplored, but potentially significant, distinction between Minnesota and California prevailing wage laws which makes it difficult to compare this case to the Eighth Circuit's decision in *Minnesota Chapter ABC*. The apprentice exemption contained in Minnesota's Prevailing Wage Law allowed for approval by either the State apprenticeship agency *or* the U.S. Department of Labor. As a result, the Eighth Circuit concluded that Minnesota was not imposing any state standards or requirements "independent and apart from the regulation authorized and provided for by the Fitzgerald Act and its accompanying regulations." *Minnesota Chapter ABC v. Minnesota*, 47 F.3d at 980-981, *quoting Electrical Joint Apprenticeship Committee v. MacDonald*, 949 F.2d 270, 274 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 2991 (1992). The Nevada apprentice exemption at issue in *MacDonald* was precisely the opposite of Minnesota's Prevailing Wage Law: it required an apprenticeship program to obtain approval from *both* the State apprenticeship agency and a federal agency. Since the Nevada State Apprenticeship Council refused to approve an apprenticeship program that had previously been approved by the Federal Bureau of Apprenticeship Training, it was clear that Nevada was regulating apprenticeship programs above and beyond the authorization given by the Fitzgerald Act. *Electrical Joint Apprenticeship Committee v. MacDonald*, 949 F.2d at 274.

In this case, it is unclear if California is attempting to impose standards and regulations in addition to those set forth in the Fitzgerald Act. Most importantly, no evidence was presented in this regard, and the district court therefore made no findings of fact with respect to the amount

of the overlap between the Fitzgerald Act regulations and the standards sought to be imposed by the California Apprenticeship Council.

Although no evidence was presented below, there are several reasons to believe that California's apprenticeship standards are more stringent and demanding than those authorized by the Fitzgerald Act. For example, the California Supreme Court previously invalidated one provision of the California Apprenticeship Council regulations on grounds of ERISA preemption because it contained a requirement not found in the Fitzgerald Act or the accompanying regulations. *Southern California Chapter ABC v. California Apprenticeship Council*, 4 Cal. 4th 422 (1992). Specifically, the California Supreme Court invalidated the regulation (8 Cal. Code Regs. 212.2) which permitted the California Apprenticeship Council to deny approval to an apprenticeship program if it would adversely affect an existing apprenticeship program.[2] Since the Fitzgerald Act and the accompanying regulations did not contain a similar requirement, the California Supreme Court ruled that the regulation was preempted by ERISA. *Southern California Chapter ABC v. California Apprenticeship Council*, 4 Cal. 4th at 450-453.

Other provisions of the current California Apprenticeship Council regulations appear to impose standards and requirements in addition to those contemplated by the Fitzgerald Act. For example, section 208 now contains a complex minimum wage formula for apprentices that is

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[2] *See Southern California Chapter ABC v. California Apprenticeship Council*, 4 Cal. 4th at 434 n.9 for the full text of the regulation invalidated by the California Supreme Court.

far beyond what the Fitzgerald Act requires. *See* App. 1-3. Similarly, Section 212(14) of the California Apprenticeship Council regulations require an apprenticeship program to contain "training in the recognition of illegal discrimination and sexual harassment." App. 7. There is no comparable requirement in the Fitzgerald Act or its implementing regulations.

If a ruling in this case should happen to depend on the extent to which California's apprenticeship standards are above and beyond those authorized by the Fitzgerald Act, this Court would be required to make the initial factual determinations. There is not an adequate record in this case to make such determinations, not to mention this Court's obvious reluctance to act as a finder of fact.

II. The Ninth Circuit Utilized the Correct Preemption Analysis.

This Court's recent decision in *New York State Conference of Blue Cross and Blue Shield Plans v. Travelers Insurance Co.*, 115 S. Ct. 1671 (1995) has no application to the instant case. The *Travelers* decision provided a model for measuring the farthest reach of ERISA preemption in those cases where the challenged statute or law does not have a "reference to" an ERISA plan, but does have a "connection with" an ERISA plan. 115 S. Ct. at 1677. Because the California statute at issue here makes specific "reference to" ERISA plans (i.e., apprenticeship programs), it is presumptively preempted.

The statute challenged in *Travelers* required hospitals to collect surcharges from patients covered by a commercial insurance company but not from Blue Cross or Blue

Shield patients, and it subjected certain health maintenance organizations (HMOs) to surcharges dependent on the number of Medicaid patients enrolled. Explaining the meaning of the "relate to" clause in ERISA's preemption provision, the *Travelers* Court quoted from *Shaw v. Delta Airlines*, 463 U.S. 85, 96-97 (1983): "[a] law 'relates to' an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan." 115 S. Ct. at 1677. The Court quickly ruled out the possibility that the surcharge statute makes "reference to" an ERISA plan, noting that the surcharges are imposed regardless of whether the insurance coverage or HMO membership is secured by an ERISA plan. *Id.* The Court then proceeded to determine if the surcharge laws have a "connection with" ERISA plans. It was in the context of grappling with the "connection with" prong of ERISA preemption analysis that the Court cautioned against "uncritical literalism" and pointed out that "infinite connections" cannot be the measure of ERISA preemption. *Id.*

This case involves the "reference to" prong of ERISA preemption analysis which the Court ruled out in *Travelers*. The statute at issue in this case – California Labor Code § 1777.5 dealing with the employment of apprentices upon public works – makes numerous "references to" apprentices, apprenticeship standards and apprenticeship committees. Pet. App. 58-63. Since ERISA defines an "employee welfare benefit plan" to include any plan, fund or program maintained for the purpose of providing "apprenticeship or other training programs" (29 U.S.C. § 1002(1)), the "reference to" an ERISA plan is beyond doubt. *See New York State HMO Conference v. Curiale*, 64

F.3d 794, 799-800 (2d Cir. 1995) (a state law has a "reference to" ERISA if its text mentions or alludes to ERISA plans and it affects ERISA plans in some measure.)

Where a statute is found to have a "reference to" an ERISA plan, preemption is automatic; no further analysis of the "connection with" standard is required. *New York State HMO Conference v. Curiale*, 64 F.3d at 799. As this Court explained in one of its earlier ERISA preemption decisions, a state statute which "specifically refers to employee welfare benefit plans regulated by ERISA is preempted on that basis alone." *District of Columbia v. Greater Washington Board of Trade*, 113 S. Ct. 580, 583 (1992). The same automatic or presumptive preemption analysis applies to this case.

The preemption analysis in *Travelers* was so difficult because the surcharge statute had only an *indirect effect* on ERISA plans. The *Travelers* Court emphasized that the surcharges made Blue Cross and Blue Shield more attractive insurance alternatives and therefore had an indirect effect on the choices made by insurance buyers, including ERISA plans. 115 S. Ct. at 1679. Similarly, the surcharges affected only indirectly the prices of insurance policies, a result, the Court observed, no different than that caused by many other non-preempted state laws. 115 S. Ct. at 1683.

Here, in contrast, the enforcement of a state prevailing wage law has a direct and immediate effect on an apprenticeship training program. In two recent cases following its *Dillingham* decision, the Ninth Circuit has squarely addressed Petitioners' argument, observing that application of a state prevailing wage law to apprentices

directly affects apprenticeship programs not approved by the State. *ABC National Line Erection Apprenticeship Training Trust v. Aubry*, 68 F.3d 343, 347 (9th Cir. 1995) (California prevailing wage statute); *Inland Empire Chapter v. Dear*, 1996 U.S. App. LEXIS 2572 (9th Cir. 1996) (Washington prevailing wage statute). In *ABC National Line Erection Apprenticeship Training Trust*, the Ninth Circuit concluded that: "[t]he market for apprenticeship programs simply does not equate with the market for health care providers" at issue in the *Travelers* case. 68 F.3d at 347. Variations in the cost of health care are unremarkable and commonplace, whereas contractors could not afford to employ apprentices if they were forbidden to pay lower wage and benefit rates to apprentices in unapproved programs. *Id.*

III. The ERISA Coverage Issue Advanced by Amicus Curiae Was Not Decided Below And There Is No Conflict Among The Lower Courts

This is not the proper time or place to brief the merits of the ERISA coverage issue raised by *Amicus Curiae Building and Construction Trades Department, AFL-CIO*. Suffice it to say that this argument ignores the explicit statutory definition of an employee welfare benefit plan. 29 U.S.C. § 1002(1). This problem aside, there are two compelling reasons why the Court should not grant review of this issue.

First, whether ERISA's reach is limited to the funding and financial aspects of an apprenticeship training program was not fully litigated below. The State Petitioners did not raise this issue at any time, and consequently,

neither the district court nor the Ninth Circuit purported to decide this issue of ERISA coverage. *See* Pet. App. 11-12, 32-33. Although a different *amicus curiae* (the Northern California Pipe Trades Council) devoted two pages of its Ninth Circuit brief to this issue, that was not sufficient to attract the Ninth Circuit's attention. Since this argument was waived in the lower courts by the State Petitioners and there is no lower court ruling on this issue to review, this case is not the appropriate vehicle to review the ERISA coverage issue raised by *Amicus Curiae*.

Second, both courts which have addressed the ERISA coverage issue raised by *Amicus Curiae* have ruled that ERISA applies to written apprenticeship standards as well as the funding aspects of an apprenticeship program. *Hydrostorage, Inc. v. Northern California Boilermakers*, 891 F.2d 719, 728 (9th Cir. 1989); *Southern California Chapter ABC v. California Apprenticeship Council*, 4 Cal. 4th 422, 436-438 (1992). As the Ninth Circuit explained in *Hydrostorage*, both the financial trust and the apprenticeship standards form "integral part[s] of a larger 'program' established for the purpose of providing 'apprenticeship . . . training'" and the larger program is an employee welfare benefit plan under ERISA. *Hydrostorage*, 891 F.2d at 728.

No lower court has reached a contrary conclusion regarding ERISA's application to apprenticeship and training programs. Since there is no difference of opinion among the lower courts on this issue, review by the Supreme Court is unnecessary at this point in time.

IV. The Ninth Circuit Correctly Rejected The Market Participant Theory Advanced By Amicus Curiae

The distinction between a State acting as a market participant and a regulator most recently explored by this Court in *Building & Constr. Trades Council v. Associated Builders*, 113 S. Ct. 1190 (1993) does not assist Petitioners or the *Amicus Curiae*. In the context of this case, the State's application of its prevailing wage law to Sound Systems was clearly a regulatory act.

In concluding that the Massachusetts Water Resources Authority was acting as a market participant in allowing the project manager to negotiate a project labor agreement for a public works project, this Court emphasized that "the challenged action in this case was specifically tailored to one particular job, the Boston Harbor clean-up project." *Building & Constr. Trades Council v. Associated Builders*, 113 S. Ct. at 1198. The bid specification being challenged required successful bidders to sign the project labor agreement, but the bid specification did not apply to any other project.

A State's enforcement of its own apprenticeship standards and prevailing wage law amounts to regulation because the effects of the State's actions are not limited to a particular job. When a State requires an apprenticeship program to obtain State approval before apprentices can be used on a public works project, the State-imposed apprenticeship standards dictate how apprentices are paid and trained on other jobs as well. State approval of an apprenticeship program does not permit an employer to ignore the apprenticeship standards on purely private contracts.

In rejecting the market participant argument in this case, the Ninth Circuit correctly observed that application of a state prevailing wage law to apprentices is not limited to a particular job:

> California in this case is not acting merely as a "market participant" rather than a regulator. The state's involvement does not end with the awarding of the contract. Section 1777.5 is aimed at regulating contractors who work on public contracts. The Division [of Apprentice Standards], part of a state agency, monitors and enforces violations of section 1777.5. This amounts to regulation, not merely "market participation."

Pet. App. 18-19, quoting *Hydrostorage, Inc. v. Northern Cal. Boilermakers*, 891 F.2d at 730.

A market participant analysis is appropriate when a public agency, "acting in the role of purchaser of construction services, acts just like a private contractor would act." *Building & Constr. Trades Council v. Associated Builders*, 113 S. Ct. at 1199. This observation exposes the flaw in the market participant argument because a private contractor would never attempt to dictate the wages and benefits Sound Systems could pay to its apprentice employees and would never require Sound Systems to obtain approval of its apprentice program as a condition of employing apprentices on a private construction project. These are the actions of a regulatory agency, not a market participant.

In a similar context, District Court Judge Wilken characterized as "wholly unpersuasive" the State of California's argument that enforcement of its prevailing wage

laws is proprietary, not regulatory, action. *WSB Elec., Inc. v. Curry*, 18 E.B.C. 2036, 2045 (N.D. Cal. 1994). The market participant argument advanced by *amicus curiae* deserves the same short shrift.

Finally, it should be noted that the market participant argument is wholly inconsistent with the State's position regarding the Fitzgerald Act and ERISA's savings clause. The argument that the Fitzgerald Act leaves the States free to impose their own apprentice standards and prevailing wage laws ultimately rests on the public policy considerations motivating those laws. The Third Circuit recognized this inconsistency in *Keystone Chapter ABC v. Foley*, 37 F.3d 945 (1994). Rejecting a similar market participant argument regarding Pennsylvania's Prevailing Wage Act, the court observed that the state was attempting to justify its actions on the basis of its traditional police power – the "right to establish labor standards." 37 F.3d at 955-956 n.15. Similarly, in *WSB Elec., Inc. v. Curry*, 18 E.B.C. 2036 (N.D. Cal. 1994), Judge Wilken observed that "Defendants [including the State of California] make much of the public policies effectuated by the prevailing wage statutes; their contradictory argument that the statutes constitute no more than the acts of a party in the marketplace are wholly unpersuasive." 18 E.B.C. at 2745.

CONCLUSION

For the foregoing reasons, the Petition For A Writ Of Certiorari should be denied.

Respectfully submitted,

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DATED: March 14, 1996

Chapter 2. California Apprenticeship Council

Subchapter 1. Apprenticeship

Article A-1. General Provisions

* * *

Article 3. Standards for Minimum Wages, Maximum Hours and Working Conditions

§ 208. Wages, Employee Benefits, and Other Compensation for Apprentices.

(a) For Apprentices In all Occupations Except The Building And Construction Industry:

For apprentices participating in approved apprenticeship programs in all industries, except the building and construction industry, the beginning wage rate, employee benefits and other compensation, and the progression of those rates, shall be decided by the sponsoring program in consultation with the Chief DAS.

(b) For Apprentices In the Building And Construction Industry Employed On Public Works Projects:

For apprentices participating in approved apprenticeship programs in the building and construction industry, the wages and employer payments for employees benefits as defined in * C.C.R. § 16000. For apprentices participating in approved apprenticeship programs in the building and construction industry, the minimum hourly wage package for apprentices while employed on projects not

covered by Subsection (b) above shall be calculated as follows:

(1) The hourly wage package for first period apprentices shall be no less than 140 percent of the annual poverty level rate for a family of three (3) published by the United States Department of Health and Human Services in the February preceding the rate determination, (beginning with the February, 1994 published rate), which annual rate shall then be divided by 1,936 hours to determine the hourly wage package;

(2) A minimum of 85 percent of the hourly wage package as determined by the formula above must be paid directly to the apprentice as taxable wages;

(3) Where an employer elects to satisfy a portion of the hourly wage package by employer payments for employee benefits as defined in 8 C.C.R. § 16000, the payment of such contributions must be verifiable, and the employer shall submit its books and records to an audit by the DAS staff, upon request, to verify such payments;

(4) The hourly wage package for first period apprentices shall be recalculated as of January 1 of every odd numbered year using the formula set out in Subsection (c)(1) above, and shall be based upon the figures published by the United States Department of Health and Human Services in February of the year preceding the recalculation. The recalculated hourly wage package for first period apprentices shall automatically become effective as of January 1 of each year in which it is recalculated for all new apprentices indentured after January 1 of that year;

(5) Each apprentice shall receive periodic, equal percentage increases in the hourly wage package for each successfully completed period of apprenticeship. The minimum amount of the periodic, equal percentage increases must be sufficient to insure that in no event shall the apprentice's hourly wage package in the final period of apprenticeship be less than 190 percent of the hourly wage package required under Subsection (c)(1), above, in effect during the apprentice's first period of apprenticeship;

(6) At least 75 percent of each periodic increase in the hourly wage package as set out in Subsection (c)(5), above, must be paid directly to the apprentice in the form of taxable wages. For each period increase, any increase above the minimum hourly wage package is not subject to this restriction;

(7) Existing apprenticeship programs already approved by the DAS and the CAC which are not in compliance with any aspect of this total wage package formula for apprentices on all projects which are subject to Subsection (c) shall have one year from the effective date of this regulation (October 6, 1995), or until the expiration of the current collective bargaining agreement covering the program, whichever is later, to come into full compliance.

(8) By the enactment of this regulation, it is not the CAC's intent to change the manner by which the Director of Industrial Relations currently determines the prevailing wage rate, and the provisions of this Subsection (c) shall not be used to determine the prevailing wage rate.

(d) For All Apprentices

Nothing in the Section shall permit the payment of less than the minimum wage prescribed by the Federal Labor Standards Act or any applicable State minimum wage order.

* * *

Article 4. Apprenticeship Standards

* * *

§ 212. Content of Apprenticeship Program Standards.

Apprenticeship programs shall be established by written standards approved by the Chief DAS. In order to be approved, the standards must cover all work performed within the apprenticeable occupation. The standards also must contain:

(a) Evidence of:

(1) work site facilities and equipment sufficient to train the apprentices:

(2) skilled workers as trainers at the work site who meet the criteria for journeyperson or instructor as defined in Section 205(a) or (b)

(3) adequate arrangements for related and supplemental instruction pursuant to Labor Code section 3074;

(4) ability to offer training and supervision in all work processes of the apprenticeable occupation;

(5) provisions for evaluation of on-the-job training and related and supplemental instruction;

(6) compliance with applicable federal regulations and standards for the apprenticeable occupation involved;

(7) the program's ability, including financial ability, and commitment to meet and carry out its responsibility under the federal and state law and regulations applicable to the apprenticeable occupation and for the welfare of the apprentice;

(8) the program's ability and commitment to train apprentices in accordance with current industry and/or trade specific training criteria, work processes, and related and supplemental instruction;

(b) A statement of:

(1) the occupations(s);

(2) The parties to whom the standards apply and the program sponsor's labor market area, as defined by Section 215 appendix 2(*l*), for purposes of meeting equal employment opportunity goals in apprenticeship training;

(3) the definition and duties of the apprentice;

(4) the working conditions of the apprentice;

(5) the wage, employee benefits and other compensation of the apprentice, as set by Section 208;

(6) the ratio or number of apprentices to be employed and the method used to determine the ratio;

(7) the mechanism that will be used to provide apprentices with reasonably continuous employment in the event of a lay-off or the inability of an employer to

provide training in all work processes as outlined in the standards;

(8) the procedure for incorporating the provisions of the standards into the apprentice agreement;

(9) the procedure utilized for the periodic review and evaluation of the apprentice's progress in job performance and related instruction; the procedure utilized for the maintenance of appropriate progress records; and the procedure utilized for the recording and maintenance of all records concerning apprenticeship and otherwise required by law.

(c) Provisions for:

(1) establishment of an apprenticeship committee, if applicable;

(2) administration of the standards;

(3) establishment of rules and regulations governing the program;

(4) determining the qualifications of employers if other than single employer programs;

(5) determining the qualifications of apprentice applicants;

(6) a system for recording the apprentice's worksite job progress and progress in related and supplemental instruction;

(7) progressively increasing the wages of the apprentice consistent with the skill acquired.

(8) discipline of apprentices, including provisions for fair hearings;

(9) terminating, or recommending the cancellation of, apprentice agreements;

(10) recommending issuance of State certificates of Completion of Apprenticeship pursuant to Section 224;

(11) revising standards as needed;

(12) safe equipment;

(13) facilities for training and supervision, both on the job and in related instruction, in first aid, safe working practices and the recognition of occupational health and safety hazards;

(14) training in the recognition of illegal discrimination and sexual harassment;

(15) fair and impartial treatment of applicants for apprenticeship, selected through uniform selection procedures, which shall be an addendum to the standards, pursuant to Section 215;

(16) mobility between employers when essential to provide exposure and training in various work processes in the apprenticeable occupation;

(17) approval of the standards by the Chief DAS;

(18) the mechanism to be used for the rotation of the apprentice from work process to work process to assure the apprentice of complete training in the apprenticeable occupation;

(19) an orientation, workshop, or other educational session for employers to explain the apprenticeship program's standards and the operation of the apprenticeship program;

(20) the on-going evaluation of the interest and capacity of individual employers to participate in the apprenticeship program and to train apprentices on-the-job;

(d) The names and signatures of the parties.